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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

VANS, INC., Plaintiff and Respondent, v. SCOTT BRABSON, Defendant and Appellant.	B165530 (Los Angeles County Super. Ct. No. BC269228)

APPEAL from a judgment of the Superior Court of Los Angeles County, Elihu Berle, Judge. Affirmed.

Greenberg Traurig, LLP, Gregory A. Nylen, Valerie W. Ho, and Harley I. Lewin for Plaintiff and Respondent.

Sanger & Swysen, Robert M. Sanger, and Catherine J. Swysen for Defendant and Appellant.

INTRODUCTION

Defendant Scott Brabson appeals from a judgment entered after the trial court confirmed an arbitration award in favor of plaintiff and respondent Vans, Inc., Brabson's former employer. Brabson contends that the trial court erred in confirming the award, where the arbitrator refused to stay the arbitration proceedings pending expiration of the statute of limitations for crimes for which Brabson was then under criminal investigation, arising out of the same events at issue in the present civil action. Brabson further contends that the arbitrator unreasonably failed to postpone the arbitration hearing in light of defense counsel's unavailability due to a scheduling conflict. Finally, he contends that the arbitrator committed misconduct by relying on post-arbitration briefing. As we will explain, we find no merit in the first two contentions, and we conclude that Brabson waived the last issue by failing to raise it in the trial court. Accordingly, we affirm the judgment in favor of Vans.

FACTUAL BACKGROUND

The Underlying Facts as Developed at the Arbitration Hearing

Vans is a designer, distributor, and retailer of footwear, snowboard boots, and apparel. It does not manufacture these products; it contracts with various entities to produce the footwear sold under the VANS brand.

Vans hired Brabson in late 1997 as Vice President of Global Sourcing, pursuant to a written employment agreement.[1] His responsibilities included locating factories to produce Vans products, ensuring that the products were of

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[1] The employment agreement included a code of ethics for employees, which contained an express prohibition against accepting kickbacks.

good quality, and generally managing Vans's manufacturing efforts in the Far East. Vans wanted to expand its operations into China at the time Brabson was hired, and he had extensive prior experience with Chinese factories.

From 1996 to 1997, the factories that manufactured Vans products were primarily located in South Korea. About 10 percent of its footwear products were manufactured in China during this period. After Brabson began working for Vans, and under his authority, production of Vans products largely moved from South Korea to China. He negotiated contracts between Vans and Chinese factories, and exercised control over those relationships.

In August 1999, Brabson hired his friend Jay Rosendahl as a consultant for Vans.

In 1996, Kenny Bair formed a trading company called CISA Developments Limited, which provided product development and sourcing services to factories that did business with Vans. CISA was formed in Taiwan, and Kenny Bair was the only officer. Bair assisted several factories in doing product development for Vans, for which the factories paid Bair, through CISA, a 5 percent commission.

Bair testified at the arbitration hearing that along with Brabson and Rosendahl, he set up a company called Asia League International, Ltd. for the purpose of receiving commissions from the Chinese factories that produced Vans products. He was directed by Brabson to divide the money one-third to CISA and two-thirds to Brabson and Rosendahl; the two-thirds was transferred to an account called "Streamflow Holdings" at the Bank of East Asia in Hong Kong. That account initially held all of the payments made by Vans's suppliers to Brabson and Rosendahl. Brabson set up the Streamflow account in 1995; his father-in-law, Dragos Kokic, was the sole signatory on the account. Bair testified that Brabson informed him by early 1999 that Bair's services were no longer required.

In May 2001, Vans General Counsel Craig Gosselin and Vans Senior Vice President of Operations Arthur Carver met with several representatives of Chinese factories that manufactured Vans products. Peter Liu, general manager of Lucky Handsome, Billy Hsiao, general manager of Johnson Footwear, and Harry Chen, part owner of Johnson Footwear, were among those representatives. The representatives told Gosselin and Carver that they had been making payments into a bank account at the Bank of East Asia for Streamflow, which payments represented a 3 percent commission on sales of Vans shoes. The representatives understood that if they stopped making these payments, Brabson would take Vans's business away from them. They gave Vans copies of bank records evidencing payment of the kickbacks into the Streamflow account. Liu said Brabson personally gave him the Streamflow account number.

The deposition testimony of Liu, Hsiao, and James Cheng, part owner of Shyang Way Company, which also made shoes for Vans, was admitted into evidence at the arbitration hearing, pursuant to the stipulation of the parties. Cheng also testified in person. Each said he had received instructions about making the payments either directly from Brabson, or from Rosendahl, who was clearly acting on Brabson's behalf.

PROCEDURAL BACKGROUND

The Present Action

Vans filed a complaint against Brabson and his wife, Gordana, and Rosendahl and his wife, Heidi, as well as various companies owned or controlled by them, in March 2002. The complaint stated claims for fraud, conversion, breach of fiduciary duty, breach of contract, and unfair competition. Vans also filed an ex parte application for a temporary restraining order to preserve assets

and property in dispute. On March 29, 2002, the superior court issued a temporary restraining order against all of the defendants, freezing the bank accounts to which kickbacks had been traced, finding "very strong evidence of [an] extensive and long term kickback scheme combined with a rather elaborate money laundering activity . . . ." In addition, the superior court granted a preliminary injunction against all the defendants.

At the same time it filed its complaint, Vans also filed an arbitration demand with Judicial Arbitration and Mediation Services (JAMS). Arbitration commenced on May 24, 2002. Vans filed a motion to consolidate the court actions and the arbitration on July 9, 2002. The court consolidated the arbitration claims and the court actions against Brabson and Rosendahl, and ordered that the arbitration be completed by January 31, 2003. Justice William Masterson, Retired, was chosen by the parties as the arbitrator.

The Requests for Stay

On June 19, 2002, Brabson filed in superior court a motion to stay the proceedings on the grounds that there was a pending criminal investigation against him involving the same set of facts. Vans filed opposition.

On July 17, 2002, the trial court granted a limited 90-day stay of discovery directed at Brabson and his wife. The court indicated the stay order had no effect on discovery as to the remaining defendants or third parties. The court ruled that Brabson's counsel was permitted to participate in all discovery.

On July 31, 2002, the arbitrator and the parties tentatively agreed on November 12, 2002, as the date the arbitration hearing would commence. On August 5, 2002, Brabson filed a motion to stay the arbitration proceedings. Vans

filed opposition. On August 13, 2002, the arbitrator granted a 60-day stay of any discovery, oral or written, which would require Brabson to respond under oath.[2]

On October 11, 2002, the parties jointly submitted to the trial court a status report regarding the criminal investigation against Brabson, indicating that investigations by the Federal Bureau of Investigation, the Internal Revenue Service Criminal Investigation Division, and the United States Postal Inspection Service were continuing; the Office of the United States Attorney had not declined prosecution. Brabson requested that the stay of discovery and other proceedings remain in place; Vans took the position that the stay should be lifted, and the Brabsons should be required to produce all corporate documents and non-incriminating personal documents and to specifically plead the Fifth Amendment privilege to any allegedly incriminating documents and deposition questions.

On October 15, 2002, the trial court continued the status conference to December 3, 2002, and ordered the stay as to Brabson to remain in effect until that date.

On October 22, 2002, the arbitrator ordered Brabson to produce documents in response to discovery. He ruled that Brabson could not invoke the Fifth Amendment to refuse to comply with the arbitrator's previous order that all parties exchange exhibit lists and produce relevant documents, because Brabson was not required to verify the document production or exhibit list. The arbitrator pointed

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[2] The arbitrator ordered that, subject to the restriction on discovery as to Brabson, each party was permitted to propound against each opposing party one set of form interrogatories and 35 special interrogatories, and 50 requests for production of documents (all documents were to be itemized on an exhibit list; documents claimed to be privileged were to be itemized on a privilege log). Each party was permitted to take depositions not to exceed 50 hours of direct examination, without limitation on the number of witnesses or deponents. A discovery deadline of November 1, 2002, was set.

out that this was in keeping with the trial court's stay order, which applied only to discovery requiring Brabson to respond under oath.

The arbitrator noted that he recognized the Fifth Amendment considerations at issue, but ruled that the stay of proceedings urged by Brabson's counsel in reliance on *Pacers Inc. v. Superior Court* (1984) 162 Cal.App.3d 686 "would be entirely inappropriate in this case, where [the trial court] has directed that the arbitration be completed no later than January 31, 2003." (Emphasis deleted.) The arbitrator stated that the more sensible approach is that set forth in the case of *Fuller v. Superior Court* (2001) 87 Cal.App.4th 299, which directs consideration of the interest of the party claiming Fifth Amendment privileges, the interest of the civil opponent in prosecuting its claim, and the interest of the justice system in processing the matters before it. "A consideration of these factors, in relation to this matter, leads ineluctably to the conclusion that the arbitration should proceed. That is why the stay order was granted in a limited fashion." The arbitrator rejected Brabson's position that he had a blanket privilege against self-incrimination.

Brabson thereafter produced documents in compliance with the arbitrator's orders.

Pursuant to the parties' joint request, by order dated October 24, 2002, the arbitrator continued the date of the arbitration hearing to December 2, 2002. On November 8, 2002, the arbitrator issued a prearbitration conference order confirming the hearing dates of December 2 to December 11, 2002.

On November 21, 2002, Brabson filed another motion to stay the arbitration, again based on Fifth Amendment grounds. Additionally, Brabson asserted that one of his attorneys, Robert Sanger, had a scheduling conflict (with a felony trial in Santa Barbara) and was unavailable. Vans filed opposition.

On November 26, 2002, the arbitrator denied the motion for continuance, noting that Rosendahl had requested that the arbitration take place as scheduled. The arbitrator also noted that Attorney Sanger knew of the scheduling conflict on November 8 and should have taken steps then to cover both matters. The arbitrator stated he would not be available for a continued hearing until a date after the January 31, 2003 deadline set by the trial court for completion of the arbitration.

At a status conference held on December 3, 2002, the trial court extended the stay of discovery as to Brabson until January 9, 2003. At the status conference held on January 9, the court lifted the discovery stay and extended the discovery deadline in the trial court action until one week before the date set for trial, February 24, 2003.

The Arbitration Hearing and the Award

The arbitration hearing commenced on December 2, 2003, and concluded on December 9, 2003. Attorney Tara Haaland was present every day representing Brabson, and Attorney Sanger was present as well with the exception of the first day, the morning of the second day, and the last day (which lasted less than two hours). Over the course of the hearing, the arbitrator heard the testimony of 11 witnesses (including the deposition testimony of several), and received into evidence voluminous exhibits.

On the last day of the hearing, the arbitrator and the parties agreed on a schedule for submission of additional briefing to specify whether Vans's claim encompassed monies derived from Asia League International, Ltd., and if so, what amount was claimed. Concerning deposits made to the Streamflow account at the Bank of East Asia, the arbitrator stated: "[I]t would have made my job easier . . . if there were a forensic accountant who had gone through this and given me a single piece of paper but, yet, nonetheless, having the records here appropriately

authenticated, the manner in which Vans chose to proceed was a legal manner and that [] evidence was before me; but [] it would be very, very useful to have a breakdown of who paid what, when and what are total amounts that were paid." That summarization of the information previously submitted during the hearing was provided in further briefing by Vans.[3]

The arbitrator issued a final award on January 29, 2003, ruling in favor of Vans and against both Brabson and Rosendahl on all of Vans's claims. The arbitrator found that Brabson and Rosendahl had solicited and received kickbacks based on a percentage of the value of the Vans products shipped by the Chinese suppliers. The arbitrator found that Brabson and Rosendahl directed the suppliers to deposit the kickbacks into the Streamflow Account; the arbitrator credited the deposition testimony of Peter Liu, the general manager of Lucky Handsome, that Brabson had personally solicited kickbacks from him. Brabson and Rosendahl failed to introduce any evidence that the payments made by the suppliers were legitimate.

In addition, the arbitrator found that the suppliers overcharged Vans to offset the amount paid as kickbacks to Brabson and Rosendahl.

Rosendahl's testimony at the arbitration hearing was adjudged to be "seriously untruthful," and the arbitrator declined to place any reliance on anything he said. In contrast, the arbitrator concluded that the witnesses presented by Vans were credible and their testimony was supported by contemporaneous documentation or other evidence.

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[3] The arbitrator also requested briefing on the law related to the burden of proof applicable where a fiduciary claims that commingled funds rightfully belong in part to the fiduciary.

Brabson and Rosendahl were held jointly and severally liable to Vans for $4,806,459.06 in compensatory damages, representing the amount of traceable kickbacks they had received.

The arbitrator awarded to Vans its attorney fees and costs in the amount of $1,857,515.21, plus interest in the amount of $1,369,244.78.

The Judgment

On February 10, 2003, Vans filed a verified petition to confirm the arbitration award and for entry of judgment. Brabson opposed the petition on the ground that the arbitrator had penalized him for exercising his Fifth Amendment privilege by denying his requests to stay the proceedings, and by refusing to postpone the arbitration due to Attorney Sanger's scheduling conflict, citing Code of Civil Procedure section 1286.2, subdivision (a)(5) (court shall vacate award if court determines "rights of the party were substantially prejudiced by the refusal of the arbitrators to postpone the hearing upon sufficient cause being shown therefor").

The trial court held a hearing on the petition to confirm. Attorney Sanger argued that the case should have been stayed for five years, the period of the statute of limitations for prosecutions for the crimes at issue, as cited by the FBI and the United States Attorney, as well as by Vans's counsel.

The trial court ruled that a reasonable basis existed for the arbitrator's decision not to stay the hearing in light of the criminal investigation. The court agreed with the arbitrator's determination that consideration of the factors discussed in *Fuller v. Superior Court, supra,* 87 Cal.App.4th 299, weighed in favor of proceeding with the hearing. The court stated: "Additionally, there is no showing of what evidence existed that could have been presented had the arbitration been continued. There is no offer of proof that there was any evidence

that was withheld or omitted with regard to what could have been shown, and there is no showing of what evidence was in the possession of respondent that would, if presented and considered, result in a different outcome." The court also ruled that Brabson had not shown he was substantially prejudiced by the arbitrator's refusal to postpone the hearing, because Brabson was competently represented by another attorney during the times Attorney Sanger was absent from the hearing.

The trial court confirmed the arbitration award, and entered judgment in the amount of $8,044,415.07 in favor of Vans.

This timely appeal followed.

DISCUSSION

I. Denial of Stay Request Due to Pending Criminal Investigation

A. Judicial Review

An award reached by an arbitrator pursuant to a contractual agreement to arbitrate is not subject to judicial review except on the grounds set forth in Code of Civil Procedure sections 1286.2 (to vacate) and 1286.6 (for correction). (*Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 33.) Applicable here, section 1286.2, subdivision (a)(5) provides that a trial court shall vacate an arbitration award if the court determines that "[t]he rights of the party were substantially prejudiced by the refusal of the arbitrators to postpone the hearing upon sufficient cause being shown therefor . . . ."

Vans argues that the arbitrator's refusal to *stay* the hearing due to the pending criminal investigation is distinguishable from an arbitrator's refusal to *postpone* a hearing, and that the denial of a stay as occurred here is not judicially reviewable. We decline to draw a distinction between a stay and a postponement.

The language of section 1286.2, subdivision (a)(5) would seem to fairly encompass the situation present here, and we therefore find the matter proper for review.

B. Denial of Stay Was Appropriate

In *Fuller v. Superior Court, supra,* 87 Cal.App.4th 299 (*Fuller*), plaintiffs alleged they were beaten by defendants, who were security guards at a shopping mall. They sued for assault and battery, among other causes of action, and eventually noticed the depositions of defendants. Defendants moved for a protective order to prevent the depositions from going forward, based on the ongoing investigations by the United States Attorney's Office and the Federal Bureau of Investigation into the events giving rise to the civil lawsuit. They asked that the depositions be stayed entirely or at least until they were no longer in jeopardy of criminal prosecution.[4] (*Id.* at p. 303.)

Plaintiffs in turn requested that the court issue an order prohibiting the defendants from testifying at trial if they chose to exercise their privilege against self-incrimination during discovery.

The trial court denied the defendants' request for a stay. It also declined to grant the order requested by plaintiffs. (*Fuller, supra,* 87 Cal.App.4th at p. 304.) Plaintiffs thereafter petitioned the appellate court for a writ of mandate, asking the higher court to direct the trial court to order that if the defendants did not testify at deposition, they would not be permitted to testify at trial. The Court of Appeal

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[4] In *Fuller*, before the court had ruled, the FBI had closed its case and the United States Attorney had recommended that its file be closed. The latter indicated, however, that it would reopen its investigation if facts warranting prosecution were developed. (*Id.* at pp. 303-304.)

In contrast here, we take judicial notice of the fact that Brabson actually was indicted in June 2004.

concluded that the trial court had correctly denied both defendant's and plaintiffs' motions.[5]

The Court of Appeal recognized with regard to the defendants' request for stay that three competing interests must be considered: "(1) that of the defendant who invokes his privilege against self-incrimination during discovery in civil litigation to avoid exposure to criminal prosecution; (2) that of the civil plaintiff who seeks to complete discovery without being unduly prejudiced if the defendant who invoked the privilege during discovery later waives it and testifies at trial; and (3) that of the justice system and the court in fairly and expeditiously disposing of civil cases." (*Fuller, supra,* 87 Cal.App.4th at pp. 304-305.)

As to the first consideration, it is well established that trial courts may not compel individuals to make responses that they reasonably believe could tend to incriminate them or subject them to criminal prosecution. (*Fuller, supra,* 87 Cal.App.4th at p. 305, citing *A & M Records, Inc. v. Heilman* (1977) 75 Cal.App.3d 554, 566; U.S. Const., 5th Amend.; Cal. Const., art. I, § 15.) It is, however, for the court to decide based upon a particularized inquiry whether or not an individual's assertion of the privilege is well founded. (*Ibid.*) "Consequently, a civil defendant does not have the absolute right to invoke the privilege against self-incrimination. [Citation.] A party or witness in a civil proceeding 'may be required either to waive the privilege or accept the civil consequences of silence if he or she does exercise it. [Citations.]' [Citation.] Courts recognize the dilemma faced by a defendant who must choose between defending the civil litigation by providing testimony that may be incriminating on the one hand, and losing the case

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[5] As to the plaintiffs' motion, the appellate court held that the request was premature, because the defendants had not yet been deposed or invoked their Fifth Amendment privilege not to testify with respect to particular questions. (*Fuller, supra,* 87 Cal.App.4th at pp. 309-310.)

by asserting the constitutional right and remaining silent, on the other hand. [Citation.]" (*Id.* at pp. 305-306.)

As previously stated, however, the interests of the civil plaintiff in an expeditious and fair resolution of their claims, and of the courts in fairly and expeditiously disposing of civil cases, also must be considered.

As the *Fuller* court noted, "[c]ourts faced with a civil defendant who is exposed to a related criminal prosecution have responded with various procedural solutions designed to fairly balance the interests of the parties and the judicial system. Accommodation of the various interests, however, is usually made to a defendant in a civil action 'from the standpoint of fairness, not from any constitutional right. [Citation.]' [Citation.]" (*Fuller, supra,* 87 Cal.App.4th at p. 307.) One accommodation is to stay the civil proceeding until disposition of the related criminal prosecution. (*Id.* at p. 308. See *Pacers, Inc. v. Superior Court, supra,* 162 Cal.App.3d at pp. 689-690.) Other courts have allowed the civil defendant to invoke the privilege against self-incrimination, even if doing so may limit the defendant's ability to put on a defense. (*Fuller, supra,* 87 Cal.App.4th at p. 308. See *Keating v. Office of Thrift Supervision* (9th Cir. 1995) 45 F.3d 322, 326 ["Not only is it permissible to conduct a civil proceeding at the same time as a related criminal proceeding, even if that necessitates invocation of the Fifth Amendment privilege, but it is even permissible for the trier of fact to draw adverse inferences from the invocation of the Fifth Amendment in a civil proceeding."].) The choice of procedural accommodations is within the province of a court's discretion in seeking to assure the sound administration of justice. (*Fuller, supra,* 87 Cal.App.4th at p. 308, citing *Avant! Corp. v. Superior Court* (2000) 79 Cal.App.4th 876, 882, and *People v. Coleman* (1975) 13 Cal.3d 867, 885.)

As did the court in *Fuller, supra,* 87 Cal.App.4th at page 309, we recognize that granting a stay until the threat of criminal prosecution has passed is one possible solution (*Pacers, Inc. v. Superior Court, supra,* 162 Cal.App.3d at pp. 689-690), but we conclude that the trial court did not abuse its discretion in confirming the arbitration award which followed the arbitrator's refusal to stay the proceedings until the criminal statute of limitations expired.

Brabson was not entitled to a blanket delay of the proceedings for several years until the five-year statute of limitations runs. Both the trial court and the arbitrator imposed a stay on any discovery which would require Brabson to respond under oath, and he was not compelled to appear for deposition or to testify; nor was he prohibited from testifying. There has been no showing as to any evidence that was withheld or omitted by Brabson that, if offered, could have led to a different result.

On the other hand, Vans, and the court, were entitled to prompt resolution of this matter, before witnesses' memories faded or records were lost. The judgment involves a substantial amount of money. The arbitrator concluded that the suppliers had overcharged Vans in order to compensate for the kickbacks they were required to pay to Brabson. Considering all of the relevant factors, the arbitrator's refusal to stay the proceedings was entirely reasonable. Accordingly, we will not interfere with the trial court's confirmation of the arbitrator's award.

II. Denial of Request for Continuance Due to Unavailability of Counsel

Brabson alternatively contends that the trial court should have vacated the arbitrator's award because the arbitrator improperly refused to postpone the hearing due to Attorney Sanger's unavailability. (Code Civ. Proc., § 1286.2, subd. (a)(5).) We disagree.

An arbitration award will not be vacated on the grounds that the arbitrator refused to postpone the hearing if any reasonable basis exists for the arbitrator's decision. (*DVC-JPW Investors v. Gershman* (8th Cir. 1993) 5 F.3d 1172, 1174.) Pursuant to section 1286.2, subdivision (a)(5), in seeking vacation of the arbitration award Brabson was required to establish both that sufficient cause existed for the postponement, and that his rights were "substantially prejudiced" by the refusal of the arbitrator to postpone the hearing. We conclude that Brabson established neither.

The hearing had been continued once already, pursuant to the parties' joint request, to December 2, 2002. On November 8, 2002, the arbitrator confirmed the hearing date. It was not until November 21, 2002, that Brabson filed another motion to stay the arbitration, based on Attorney Sanger's scheduling conflict with a felony trial in Santa Barbara. In denying the continuance, the arbitrator noted that Rosendahl had requested the arbitration take place as scheduled, and that Attorney Sanger knew of the scheduling conflict on November 8 and should have taken steps then to cover both matters. In addition, the arbitrator would not be available for a continued hearing until a date after the January 31, 2003 deadline set by the trial court for completion of the arbitration. The circumstances demonstrate the arbitrator had a reasonable basis for his decision that sufficient cause did not exist for the postponement.

Despite Brabson's claim otherwise, other counsel, Attorney Haaland, was indeed available to and did represent Brabson during those times when Sanger was unavailable. Vans accommodated Brabson by changing the order in which witnesses were taken so Sanger could cross-examine Gosselin and Carver. Sanger was present during most of the arbitration, and conducted the cross-examination of Vans's witnesses, including Gosselin, Carver, Rosendahl, and Bair, among others, with the exception of James Cheng, who was adeptly cross-examined by Haaland.

In addition, Sanger was not present for arguments on motions in limine and during opening statements, as well as during Vans's direct examination of Gosselin, and Rosendahl's cross-examination of Gosselin. Finally, Sanger was absent on the last day of the hearing during which Haaland conducted direct examination of Susan Alice Boldt for 15 minutes, after which the parties rested.

Brabson has not demonstrated that he was substantially prejudiced by Sanger's absence during portions of the hearing. The arbitrator ensured that daily transcripts were available to Sanger. As the trial court found, Haaland provided entirely competent representation during the times Sanger was absent. No basis for vacating the award was presented by Brabson based on the arbitrator's refusal to continue the matter.

III. Reliance on Post-Arbitration Briefing

Finally, Brabson contends that, in awarding to Vans $1.8 million in attorney fees and costs, the arbitrator committed misconduct (Code Civ. Proc., § 1286.2, subd. (a)(3)) by improperly relying on post-arbitration briefing that included expert witness testimony although no expert was designated by Vans, and in violation of JAMS' rules.

As Vans points out, however, this issue was not raised in the trial court in opposition to the petition to confirm the arbitration award. Having failed to raise the issue in the trial court, the issue was waived, and we will not consider it for the first time on appeal. (*Santantonio v. Westinghouse Broadcasting Co.* (1994) 25 Cal.App.4th 102, 113, citing *Evers v. Cornelson* (1984) 163 Cal.App.3d 310, 315.) Points not raised in the trial court will not be considered on appeal. (*Hepner* v. *Franchise Tax Bd.* (1997) 52 Cal.App.4th 1475, 1486, citing *Dimmick* v. *Dimmick* (1962) 58 Cal.2d 417, 422. To permit a party to raise a new issue that was not

raised in the trial court would not only be unfair to the trial court, but manifestly unjust to the opposing party. (*North Coast Business Park v. Nielsen Construction Co.* (1993) 17 Cal.App.4th 22, 29.)

In any event, the briefing submitted by Vans, to which Brabson had the opportunity to respond and did so, did not constitute either new evidence or expert testimony as Brabson now contends. As the arbitrator recognized, rather than using an expert witness such as a forensic accountant to present a summary of the monies deposited as kickbacks, Vans presented that evidence through various witnesses. It was not obligated to do otherwise, and the post-hearing briefing simply provided a summarization of the evidence already presented. No error has been demonstrated.

DISPOSITION

The judgment is affirmed.

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CURRY, J.

We concur:

EPSTEIN, P.J.

HASTINGS, J.